PD-0715-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/9/2018 5:19 PM
Accepted 4/11/2018 10:19 AM
DEANA WILLIAMSON
CLERK

No. PD-0715-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/11/2018
DEANA WILLIAMSON, CLERK

JOSEPH SMITH,
Appellant

v.

THE STATE OF TEXAS,
Appellee

APPELLANT'S BRIEF ON THE MERITS

On Grant of Appellant's Petition For Discretionary Review
from the Fourteenth Court of Appeals Cause No. 14-15-00502-CR,
affirming the judgment in Cause No. 1336966
from the 228th District Court, Harris County, Texas.

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

SARAH V. WOOD
Assistant Public Defender
Harris County, Texas
Texas Bar Number 24048898
1201 Franklin, 13th Floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
Sarah.Wood@pdo.hctx.net

Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Joseph Smith
TRIAL PROSECUTOR:	Jennifer Meriwether Assistant District Attorney Harris County, Texas 1201 Franklin, Suite 600 Houston, Texas 77002
DEFENSE COUNSEL AT TRIAL:	Robert Scardino Philip Scardino 1004 Congress, 2nd Floor Houston, Texas 77002
PRESIDING JUDGE:	Hon. Reagan Clark, Visiting 228th District Court Harris County, Texas 1201 Franklin Houston, Texas 77002
DEFENSE COUNSEL ON APPEAL:	Sarah V. Wood Assistant Public Defender Harris County, Texas 1201 Franklin, 13th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

Mr. Joseph Smith was indicted on February 24, 2012 for aggravated robbery. (C.R. at 12). He pleaded not guilty and proceeded to trial. Although Mr. Smith's first trial resulted in a hung jury, he was later convicted and sentenced to life in prison at his re-trial. (C.R. at 390, 424).

The Fourteenth Court of Appeals affirmed the judgment in a published, plurality opinion in which the three-justice panel divided three ways with a majority, a concurring, and a dissenting opinion. *Smith v. State*, 522 S.W.3d 628, 631 (Tex. App.—Houston [14th Dist.] 2017, pet. granted). This Court granted the appellant's pro se petition for discretionary review on December 13, 2017 and counsel was subsequently appointed.

ISSUES PRESENTED

1. The court of appeals employed the wrong analysis when reviewing the record to determine whether a "voluntary intoxication" instruction was error to include in Appellant's punishment-phase jury charge.
2. The inclusion of an 8.04(a) instruction at punishment violates the Due Process Clause because it could mislead a rational jury into believing that it could not - as a matter of law - consider a defendant's drug-addiction evidence as mitigation; thus the court of appeals' holding that it is not a charge error conflicts with applicable holdings of the U.S. Supreme Court.
3. In its harm analysis of the State's unconstitutional jury argument, the court of appeals did not address how that argument highlighted inadmissible evidence and how it impermissibly increased the likelihood that the jury punished Appellant specifically for an extraneous crime.

STATEMENT OF FACTS

Mr. Smith suffered from a severe drug addiction from a very young age that acutely impeded his ability to anticipate the consequences of his actions and tragically distorted his emotional reactions to the circumstances in his life. Dr. Rustin, an expert for the defense, testified at punishment that Mr. Smith first used Xanax at age fourteen and would take six to eight tablets on a daily basis over a period of many years. (7 R.R. at 125, 136).

He explained, "One of the primary effects of Xanax is to reduce worry so that people will do things that they wouldn't ordinarily do under that effect… If you take more of the drug, then you begin to lose control of your body." (7 R.R. at 124). Xanax works to reduce one's fear and increase feelings of aggression and dominance. (7 R.R. at 132). The doctor explained to the jury that it is actually "very common" for someone taking high doses of Xanax to commit a very serious crime because of its unusual combination of effects on the user's mind. (7 R.R. at 133).

At the conclusion of the testimony at the punishment phase of trial, the trial court granted the State's request to submit the following jury instruction:

> Voluntary intoxication does not constitute a defense to the commission of a crime. "Intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

(C.R. at 413).

Defense counsel objected to the charge, arguing, "We take the position it's not appropriate in the punishment stage of the trial.…This voluntary intoxication charge, basically, takes away the expert witness Rustin's testimony [regarding Xanax addiction] completely. It's telling the jury just to ignore it." (7 R.R. at 163).

The prosecutor responded, "We simply ask that this instruction be included so that the jury doesn't recognize or excuse the defendant's behavior on the aggravated robbery." (7 R.R. at 164).

The trial judge agreed with the State, explaining, "I don't want the jury, as the prosecutor just stated, to become confused to think that because he was on some drug, and it might have messed his mind up, that the punishment should be diminished to the point to where there could be no punishment." (7 R.R. at 164-65). The judge then instructed the jury that voluntarily intoxication is not a defense.

At closing argument, defense counsel read the 8.04(a) instruction aloud to the jury and concluded, "That's not what my brother and I feel like we would like you to consider." (7 R.R. at 185). He explained, "What we are suggesting to you is that our law allows us to bring you evidence in the punishment phase of any trial that you may consider as mitigation."

The prosecutor argued in response, "There is no—I repeat—no mitigation for his activity. He's the one that chose to put that Xanax in his mouth. He didn't have a prescription for it. He chose to take it." (7 R.R. at 201).

Then the prosecutor urged the jury to consider his description of Mr. Smith's demeanor during the sentencing hearing, even though Mr. Smith did not testify. During closing argument at punishment, the following occurred:

> Prosecutor: Imagine what the end of Hong Le's life was like. You heard his sister testify about the funeral service and having to cover up that wound in the head, and you heard about his children. And I hope you got an opportunity to see how the defendant reacted to that. Nothing, absolutely nothing; never a sign of remorse, never; never a sign of remorse. That is just plain wrong. That is evil, that is something you don't want in our community.
>
> Defense: That's improper argument. She's arguing outside the record of what the accused may look like during testimony. I submit it's not evidence.
>
> Court: Overruled.

(7 R.R. at 203-204). The jury sentenced Mr. Smith to the maximum punishment of life in prison.

SUMMARY OF THE ARGUMENT

During the sentencing proceeding that resulted in a life sentence, the trial court essentially rendered the appellant's mitigation evidence null and void and permitted the State to enflame the jury by inferring he was remorseless from his courtroom demeanor.

The lead opinion of the court of appeals incorrectly determined, through flawed reasoning, that it was not error to instruct the jury during punishment that "voluntary intoxication is not a defense." This instruction only applies at guilt-innocence and not at punishment. The jury's job during sentencing is not to consider the existence of legal defenses to criminal liability—not even with regard to extraneous offenses. Although the charge may have been a correct statement of law, it was inapplicable at punishment and only served to unnecessarily draw the jury's attention to the defendant's evidence of drug addiction as a comment on the weight of that evidence.

The erroneous instruction caused—at the very least—some harm to the appellant, as required for reversal. The effect of the charge was to prevent the jury from considering the cornerstone of the defense at punishment: defendant's drug addiction. It is not plausible that jurors would have interpreted the instruction to apply only to guilt-innocence since the defendant had already been convicted and that decision was no longer in front of them. Seeking to find meaning in each aspect of the judge's instruction, the jury would reasonably have believed the charge applied to the evidence at punishment. If the jury had been permitted to consider the appellant's mitigating evidence, it is entirely likely they would have sentenced him to something less than life in prison.

The flawed instruction rose to the level of a due process violation by acting arbitrarily to exclude from consideration vital evidence that formed the basis for the central defense at punishment. It prevented the sentencer from considering the sole mitigating evidence, eroded the adversarial nature of the proceeding, and infringed upon the right to present witnesses on one's behalf. This was in violation of due process under the United States and Texas Constitutions.

The court of appeals also erred in finding harmless the prosecutor's argument that used the appellant's alleged courtroom demeanor against him. The focus of the State's argument was on highlighting the most prejudicial evidence admitted at punishment and directly commenting on the appellant's courtroom demeanor during production of this evidence. This comment was not correlated to the appellant's lack of remorse at the time of any offense but rather during the inflammatory testimony itself. Considering that the appellant received the maximum sentence allowed by law, it is reasonable to conclude that the improper argument genuinely contributed to the jury's punishment verdict.

ARGUMENT

Ground One: The court of appeals employed the wrong analysis when reviewing the record to determine whether a "voluntary intoxication" instruction was error to include in Appellant's punishment-phase jury charge.

The inclusion of a "voluntary intoxication" instruction under Texas Penal Code 8.04(a) at the punishment stage is erroneous because it is only applicable at the guilt-innocence phase of trial. When misplaced in a punishment charge, it does not set forth the law applicable to that stage of the case. Such an instruction also improperly comments on the weight of the evidence by singling out specific defense evidence. A majority of the panel did find that the instruction was in error. While the lead opinion failed to reach the correct decision, neither the concurring nor the dissenting justice agreed with that portion of the opinion.

Additionally, the erroneous instruction in this case amounted to at least "some harm" because 1) the appellant introduced evidence of drug addiction, which was mitigating; 2) a reasonable juror would have interpreted the instruction to preclude consideration of such evidence as mitigating, and 3) had the jury believed it could attach a mitigating weight to that evidence, it is reasonably likely that the appellant would have received a punishment of less than a life sentence.

A. Review of the jury charge on appeal is determined by *Almanza v. State* and Articles 39.14 and 39.19 of the Code of Criminal Procedure

This Court's opinion in *Almanza v. State* established the standard for reviewing a challenge to the jury charge on appeal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Appellate review of claims of jury-charge error first involves a determination of whether the charge was erroneous and, if it was, then second, an appellate court conducts a harm analysis. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). "This framework is not a court-made rule; it is based on this Court's interpretation of Article 36.19… and its statutory predecessors…" *Posey v. State*, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998).

> Charge error is defined by Texas Code of Criminal Procedure art. 36.19:
>
> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 has been disregarded…

Tex. Crim. Proc. Code § 36.19. "This defines the 'error' for purposes of *Almanza*." *Posey*, at 60. In the first step of analysis, the reviewing court must look to whether any of the listed statutory provisions were violated. Article 36.14 is of central importance, which states:

> [T]he judge shall… deliver to the jury… a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the

> facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.

Tex. Crim. Proc. Code § 36.14.

In this case, the plurality opinion used a different reasoning, seemingly of its own design. Without citing to any authority, the lead opinion employed the following analysis to determine whether error occurred:

> To determine if the misplaced instruction amounts to error, we must look at the reasons it would be wrong to include the instruction in the charge. If those reasons are not implicated, then the inclusion of the out-of-place instruction cannot fairly be characterized as error. In today's case appellant points to jury confusion over the ability to consider mitigating evidence as the reason the trial court erred in including the challenged instruction. In this context, jury confusion would equate to charge error. And, conversely, if the plain language of the challenged instruction could not have confused a reasonable jury, then the instruction, though misplaced, would not amount to error.

Smith v. State, 522 S.W.3d 628, 634 (Tex. App.—Houston [14th Dist.] 2017, pet. granted).

This analysis by the lead opinion ignores this Court's definition of charge error as explained in *Posey* and *Almanza*. Reviewing the record solely for "jury confusion" is not an adequate test for "error." A charge may not confuse a jury but may still violate

article 36.14 for other reasons. *See Brown v. State*, 122 S.W.3d 794, 802 (Tex. Crim. App. 2003) (holding that it was an erroneous comment on the evidence to give an instruction even though it was an otherwise correct statement of law). In this case, "jury confusion" is a question more pertinent to the harm analysis rather than to whether the instruction is error in the first place.

B. When given at punishment, an 8.04(a) instruction violates art. 36.14 because it does not set forth the law applicable to the case and it amounts to a comment on the evidence

Because it was improperly given at the punishment stage, the instruction violated article 36.14 because 1) it did not distinctly set for the law applicable to the case and 2) it improperly commented on the weight of the evidence.

1. An 8.04(a) instruction only applies to the law at the guilt-innocence phase of trial

In *Taylor v. State*, this Court addressed the purpose of 8.04(a) and unequivocally stated that it is not a mitigation provision, but is instead "directed to the guilt-innocence phase of trial." *Taylor v. State*, 885 S.W.2d 154, 156 n. 4 (Tex. Crim. App. 1994); *and see Sakil v. State*, 287 S.W.3d 23, 26 n. 6 (Tex. Crim. App. 2009) (reaffirming that "[s]ubsection (a) is directed to the guilt phase of trial.").

When the same unusual error occurred in *Kresse v. State*, it is notable that the State "concede[d] that the inclusion of the voluntary intoxication instruction during the punishment stage of the trial was erroneous because, if applicable, it is to be given

during the guilt-innocence stage of trial, not punishment." *Kresse v. State*, 2-09-271-CR, 2010 WL 1633383, at *2 (Tex. App.—Fort Worth Apr. 22, 2010, no pet.)(mem. op., not designated for publication).

When the Court in *Taylor* pronounced that 8.04(a) does not apply at sentencing, it focused on the use of the word "defense." *Taylor* at 156. This is in line with this Court's later opinion in *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998) which explained that a trial court must not label as a "defense" in a jury charge anything that the legislature has not specifically labeled as such. *Id.* at 250. In explaining what the legislature has defined "defense" to mean, this Court looked to the Penal Code and concluded that it is reserved for defensive theories that attempt to explain why a defendant is not criminally culpable of an offense. *Id.* at 248-50. And since criminal culpability is a question for the jury only at guilt-innocence, any instruction regarding a "defense" would necessarily be inapplicable at punishment. See *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005) ("Unlike the guilt-innocence phase, the question at punishment is not whether the defendant has committed a crime, but instead what sentence should be assessed.")

Article 36.14 of the Code of Criminal Procedure requires a judge to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." It is axiomatic that if 8.04(a) only applies at guilt-innocence, then it cannot be "applicable to the case" at punishment.

2. Because juries are not to determine criminal liability for extraneous acts introduced at punishment, instructions on statutory defenses are inapplicable

The State argued on appeal that the instruction was appropriate at the punishment phase because the jury could have properly applied it to evidence of extraneous offenses which were introduced for the first time at punishment. The court of appeals' concurring opinion would adopt a similar view, asserting that "the instruction could have been modified to apply only to extraneous offenses." *Smith*, 522 S.W.3d at 640-41. Both arguments are flawed.

The role of the jury at punishment is to hand down a sentence for the convicted offense, not to determine whether the defendant is criminally liable for an extraneous offense. *See Haley*, supra. To demonstrate this point, Tex. Crim. Proc. Code § 37.07 sec. 3(a)(1) provides for the introduction of "any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act."

Article 37.07 thus specifically allows for the admission of "bad acts" for which the defendant could *not* be held criminally responsible. It presumes that criminal liability for extraneous acts will not be litigated in punishment.

"Whereas the guilt-innocence stage requires the jury to find the defendant guilty beyond a reasonable doubt of each element of the offense, the punishment phase

requires the jury only find that these prior acts are attributable to the defendant beyond a reasonable doubt." *Haley*, at 515. Once the State meets this burden, the jury "may use the evidence [of the extraneous acts] however it chooses in assessing punishment. Thus, this evidence serves a purpose very different from evidence presented at the guilt-innocence phase." *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999).

Moreover, courts have held that defendants are not entitled to instructions regarding defenses at punishment. This Court's opinion in *Wesbrook v. State* makes this point clear. *Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000). In that case, the State introduced evidence at punishment that the defendant committed the extraneous offense of solicitation of capital murder by ordering the killings of witnesses in his case. *Id.* at 116. But, because there was evidence that he called off the killings, the defense requested an instruction on the defense of renunciation. *Id.* at 121-22. This Court affirmed the trial court's denial of the renunciation instruction at punishment as "inapplicable because the affirmative defense instruction would only apply to a prosecuted offense…" *Id.* at 122.

In *Gomez*, the court upheld the denial of a self defense instruction regarding an extraneous offense at punishment. *Gomez v. State*, 380 S.W.3d 830, 839 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). The court explained that "to prove an extraneous offense at punishment, the State is only required to prove beyond a reasonable doubt a defendant's involvement in the bad act: a finding of guilt for a crime is not required." *Id.*

When an extraneous offense is introduced at punishment, statutory defense are inapplicable because it is not the forum to litigate criminal liability. The jury is only to consider the defendant's involvement in the misconduct and assign moral culpability in any manner it sees fit. If, as in *Wesbrook* and *Gomez*, a defendant is not entitled to an instruction on a statutory defense to an extraneous offense because it is "inapplicable" at punishment, then it necessarily follows that the State's request for an anti-defensive instruction is just as erroneous.

As this Court explained in *Ex parte Ingram*, the term "anti-defensive" refers to "an issue that benefits the State's position in the case but is not something the indictment required the State to prove from the outset." *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017), reh'g denied (Sept. 27, 2017). "Perhaps the most common anti-defensive issue is voluntary intoxication…" *Id.*

This Court held that "an instruction on [an anti-defensive] issue is appropriate only when some evidence at trial raises it. Only at that time does an anti-defensive issue become law applicable to the case." *Id.* Because it is axiomatic that a "defense" cannot be raised at punishment—either on the offense of conviction or on extraneous acts—it will never become the law applicable to a sentencing jury.

Since defensive instructions are not applicable at punishment, neither are anti-defensive instructions. The instruction in this case did not set forth the law applicable at punishment and clearly amounted to error.

3. The 8.04(a) instruction impermissibly commented on the weight of the evidence by erroneously drawing attention to the appellant's evidence of drug addiction.

In *Brown v. State*, this Court extensively discusses article 36.14's provision that jury instructions must not comment on the weight of the evidence. *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003). The Court explained that such instructions must be excluded because "jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved." *Id.* at 798.

"On the far end of the 'improper-judicial-comment' scale is a comment or instruction that states a mandatory presumption and thereby violates due process." *Id.* at 799. In *Francis v. Franklin*, the Supreme Court held that an erroneous instruction violated due process because "the challenged sentences are cast in the language of command." *Francis v. Franklin*, 471 U.S. 307, 316 (1985). Likewise, the instruction in this case operated as a decree from the trial judge prohibiting the jury's consideration of voluntary intoxication evidence.

The Court in *Brown* went on to explain that an instruction "might obliquely or indirectly convey some opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it." *Brown*, at 801. This type of improper judicial comment is "an instruction that is simply unnecessary and fails to

clarify the law for the jury." *Id.* The anti-defensive instruction in this case was, by all accounts, unnecessary and failed to clarify the applicable law.

The erroneous instruction in *Brown*, this Court held, was not an incorrect statement of the law and did not command the jury to make a particular decision. Nonetheless, it constituted an improper comment on the weight of the evidence—simply by highlighting a particular type of evidence. "While the instruction is certainly neutral and it does not pluck out any specific piece of evidence, it does focus the jury's attention on the type of evidence that may support a finding of criminal intent." *Id.* at 802; *and see Bartlett v. State*, 270 S.W.3d 147, 152 (Tex. Crim. App. 2008) ("Even a seemingly neutral instruction may constitute an impermissible comment on the weight of the evidence because such an instruction singles out that particular piece of evidence for special attention."); *Santos v. State*, 961 S.W.2d 304, 306 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) ("Even though the instruction constitutes an accurate statement of the law, it magnifies a particular fact giving unfair emphasis to that fact.").

The instruction in this case did target a specific piece of defense evidence—drug addiction—and commanded the jury not to consider it as a "defense." This unnecessary comment drew the jury's attention to the only evidence offered by the defense and enhanced the State's argument that drug addiction is not mitigation. (7 R.R. at 201).

In *Kresse*, the Fort Worth court of appeals addressed an issue nearly identical to the one presented here. *Kresse v. State*, 2-09-271-CR, 2010 WL 1633383 (Tex. App.—Fort Worth Apr. 22, 2010, no pet.)(mem. op., not designated for publication). Holding

it was error to include a voluntary intoxication instruction at punishment, the court stated that "the instruction incorrectly emphasized a portion of the State's case and drew particular attention to one aspect of it." *Id.* at *4. As in this case, the 8.04(a) instruction constituted an impermissible comment on the weight of evidence.

As noted by the dissent in this case, "An 'unnecessary' instruction can amount to an improper comment on the weight of the evidence. *See Brown v. State*, 122 S.W.3d 794, 801 (Tex. Crim. App. 2003). And a charge can be erroneous even if it perfectly tracks the language of a statute. *E.g., Navarro v. State*, 469 S.W.3d 687, 698–700 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). "An instruction, albeit facially neutral and legally accurate, may nevertheless constitute an improper comment on the weight of the evidence." *Kirsch v. State*, 357 S.W.3d 645, 651 (Tex. Crim. App. 2012).

C. The instruction harmed appellant because there is a reasonable likelihood that the jury misinterpreted the instruction as meaning that it could not, as a matter of law, consider the mitigating aspect of appellant's evidence

The court of appeals was not only divided over whether the instruction was error in the first place, but also over whether it was harmless error. In his concurring opinion, Justice Jewell "would hold that the erroneous instruction did not cause appellant actual harm under the present circumstances." *Smith*, 522 S.W.3d at 640. In her dissent, however, Justice Christopher "would conclude that the error resulted in some harm." *Id.* at 647.

Because the court of appeals addressed whether the 8.04(a) instruction was harmless error, the issue of harm is properly before this Court. Moreover, "harm is always an issue properly before this Court whenever error is discovered." *Elizondo v. State*, 487 S.W.3d 185, 204 (Tex. Crim. App. 2016) (citing *Miller v. State*, 815 S.W.2d 582, 586 n. 2 (Tex. Crim. App. 1991)).

Where defense counsel has objected at trial, an appellant will obtain relief if the record shows that he suffered "some harm." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). This is considered a "low threshold" and the appellant is not required to actually demonstrate harm. *Navarro v. State*, 469 S.W.3d 687, 700 (Tex. App.—Houston [14th Dist.] 2015), pet. ref 'd. "[T]he presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction. Cases involving preserved charging error will be affirmed only if no harm has occurred." *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986).

While the instruction in this case was a correct statement of law, it is likely that the jurors' interpretation of the instruction was not legally correct. The jury would not have understood the word "defense" in the punishment charge as pertaining solely to their decision on guilt-innocence. Jurors already knew it was not their job to determine guilt or innocence at sentencing.

Just like when an appellate jurist interprets a statute, the jurors would have attempted to give meaning to each aspect of the court's charge. It defies logic to think they would have disregarded the instruction as inapplicable at punishment. Because, as

we know, "jurors are prone to seize with alacrity upon any… language of the trial judge which they may interpret as shedding light upon… the merits of the issues involved." *Brown*, 122 S.W.3d at 798.

The jury was unlikely to decipher that the charge worked only to prohibit their consideration of intoxication as it related to the defendant's guilt and not as to the mitigation of his punishment. The jury would have known that they were not deciding the defendant's guilt. The jury also would have assumed that each instruction would have an effect upon their decision-making at punishment. In order to give effect to the instruction, it could only be interpreted to inhibit their consideration of intoxication as mitigation at punishment because that was the only issue before them. *See, e.g. Reeves*, 420 S.W.3d at 819 (noting the "instruction's presence in the jury charge implied that there was some evidence to support [its inclusion].").

The problem with placing an 8.04(a) instruction in the punishment phase charge lies mainly with the instruction's use of the word "defense." This is because the term "defense" has a technical legal meaning (of which the jury is presumed not to know) that is distinguished from its broader meaning in common parlance (of which the jury most likely understood it as). This common meaning is much more expansive than the technical legal meaning and, when used in a punishment phase charge, necessarily includes within its meaning the concept of mitigating circumstances.

The lead opinion in this case insists, "[W]e should credit the jury with understanding plain English and with being able to distinguish between voluntary

intoxication as a defense to a crime and voluntary intoxication as mitigating circumstances for punishment." *Smith* 522 S.W.3d at 634.

However, in this case the jury would actually have been prohibited from interpreting the word "defense" in its "plain English" meaning. "The canons of construction dictate that words and phrases possessing a technical meaning are generally to be considered as having been used in their technical sense." *Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000) ("'Arrest' is a technical term possessing a long, established history in the common law, and it would be inappropriate if jurors arbitrarily applied their personal definitions of arrest.").

The power to establish and define what constitutes a "defense" rests solely within the discretion of the legislature. *Giesberg*, 984 S.W.2d at 249. "The term defense should not be used for an issue that has not been specifically labeled as such by the Legislature." *Id.* at 250. In this case, the word "defense" was not defined for the jury. The jurors would not have had any clue that their interpretation of the word must be restricted to its technical legal definition.

Bryan A. Garner, editor in chief of *Black's Law Dictionary*, has commented on the usage of the term "defense," observing: "Some writers worry that this word can lead to misunderstandings because it is used in different ways… Glanville Williams, though, considers these worries pedantic: 'A defence is any matter that the defendant will in practice raise, whether he is legally obliged to do so or not.'" Garner, Bryan A., *A Dictionary of Modern Legal Usage* 257 (2nd ed. 1995). Thus according even to wordsmith

Garner, a "defense" at punishment can be construed to encompass matters raised by the defendant as mitigation. Jurors are not trained in the law and would have no reason to limit the meaning of the word to matters raised only at guilt-innocence since the charge was given to them at punishment.

In *Baer v. Neal*, the Seventh Circuit recently considered an issue nearly identical to the present case and reversed for a new punishment hearing as a result. *Baer v. Neal*, 879 F.3d 769 (7th Cir. 2018). There, the trial court erroneously gave a "voluntary intoxication" instruction at punishment which stated, "Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense…" *Id.* at 779.

Just as in this case, the underlying state court affirmed because the instruction "was a correct statement of law and was relevant to determining whether Baer committed his crimes intentionally… [and] because the trial court told jurors they could consider 'any circumstances in mitigation' and that 'there are no limits on what factors an individual juror may find as mitigating'…" *Id.* (internal citation omitted).

The federal court held that the state court's opinion was "unreasonable" and that a "reasonable juror could have understood the complete penalty phase jury instructions as foreclosing evidence of voluntary intoxication from consideration for all purposes in sentencing, including barring voluntary intoxication as mitigating evidence." *Id.*

In direct contradiction to the lead opinion in this case, the Seventh Circuit opined, "It is unreasonable to assume jurors could catch the nuance that voluntary

intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction." *Baer*, 879 F.3d at 779.

Rejecting the state court's position that the charge was acceptable as a correct statement of law, the Seventh Circuit emphasized that—while correct in isolation—it was given out of context:

> [T]he challenged voluntary intoxication instruction was given at the penalty phase trial—after Baer had been convicted of intentionally committing his crimes. Intent was not challenged before the jury at the penalty phase; it was decided at the guilt phase. So, it is unlikely the jury understood that this instruction, given again at the penalty phase, was applicable only to the decided issue of intent. A reasonable juror would have understood this instruction as excluding evidence of voluntary intoxication for purposes of punishment, specifically excluding voluntary intoxication as a mitigating factor."

Id. at 779-80.

Just as in this case, the federal court also rejected the state's position that any confusion created by the voluntary intoxication charge was cured by other instructions that permitted the jury to consider all of the evidence for purposes of mitigation.

> Looking at the state court's finding in light of the entire charge, we again find the state court's analysis unreasonable. While the "any other circumstance" and "no limits" instructions contradicted the instruction

> excluding voluntary intoxication evidence, the contradiction did not provide clarity. "'Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (citing *Francis*, 471 U.S. at 322)… We are left with "no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.* Therefore, we find that the state court's conclusion that the trial court's broad and generic mitigating instructions cured the faulty instructions was not reasonable.

Baer v. Neal, 879 F.3d 769, 780 (7th Cir. 2018). Similarly, the generic instruction to consider all of the evidence in the case cannot cure the error in the case at bar.

The court also observed the exacerbating impact of argument, stating, "In fact, the jury had been primed to believe that voluntary intoxication could not impact sentencing. The prosecutor even told jurors in his closing argument that 'self-induced drugs is[sic] no protection from law ... we don't give anybody a pass who takes drugs on their own and then uses it as ... some effort to make their sentence a little easier.'" *Id.* at 780.

Likewise, in this case the prosecutor primed the jury to disregard the mitigating effect of drug addiction: "There is no—I repeat—no mitigation for his activity. He's the one that chose to put that Xanax in his mouth. He didn't have a prescription for it. He chose to take it." (7 R.R. at 201). The State's comments emphasized the "voluntary" nature of the intoxication and instructed the jury that it constituted "no mitigation."

The prosecutor's argument was supported by the 8.04(a) charge that it constituted "no defense."

Finding harm from the erroneous instruction, the Seventh Circuit emphasized that—as in this case—the appellant's primary defense at punishment was drug addiction.

> Here, evidence of Baer's intoxication by methamphetamine use at the time of the offense, as well as his voluntary drug use for a large period of his life, was central mitigating evidence that the jurors should have considered. Evidence of Baer's mental health and drug use were intertwined as the cornerstone of Baer's defense, and defense counsel's sole strategy for avoiding a death sentence was ensuring that the jury considered and gave effect to Baer's mental health and intoxication evidence.

Baer, 879 F.3d at 781. With drug addiction as the "cornerstone" of the appellant's defense at punishment in this case, he was necessarily harmed by the trial court's erroneous inclusion—over objection—of the voluntary intoxication instruction. It is reasonably likely that the jury interpreted this charge as preventing their consideration of the appellant's sole defense as mitigation of his sentence. If they had, the jury would likely have pronounced a sentence of less than the maximum life in prison.

As this Court has recognized, the evidence of appellant's drug addiction should have been considered mitigating by the jury. In *Ex parte Smith*, this Court reviewed

precedent supporting "drug addiction as a mitigating factor that reduces a criminal defendant's moral culpability." *Ex parte Smith*, 309 S.W.3d 53, 62 (Tex. Crim. App. 2010).

In that case, the Court held that "the evidence tends logically to show that the applicant's ability to exercise moral judgment (as compared to his ability to exercise control of his conduct) was overcome by his severe drug addiction. A fact-finder could reasonably deem this circumstance to have mitigating value. While it did not disprove deliberateness or future dangerousness, it was an explanation for his behavior that might reduce his moral culpability." *Id.* By this logic, the appellant in this case was actually harmed because the jury was unable to apply the appropriate mitigating value which may have reduced his moral culpability.

Ground Two: The inclusion of an 8.04(a) instruction at punishment violates the Due Process Clause because it could mislead a rational jury into believing that it could not - as a matter of law - consider a defendant's drug-addiction evidence as mitigation; thus the court of appeals' holding that it is not a charge error conflicts with applicable holdings of the U.S. Supreme Court.

The erroneous jury charge in this case prevented the jury from favorably considering evidence of the appellant's drug addiction which was the sole defense presented at punishment. In doing so, the jury instruction violated due process by preventing the appellant from advancing his only defense and preventing the jury from considering any of his mitigating evidence. It turned the sentencing hearing into a one-sided argument and felled its adversarial nature.

After the presumption of innocence is extinguished by a finding of guilt, there is no constitutional right to a jury for sentencing in noncapital cases and thus a convicted defendant is without many of the rights attendant to such formal proceedings. However, Texas is unique in that its statutory law gives rise to a formal hearing before a jury in which the rules of evidence apply along with the panoply of procedural due process protections. Tex. Code Crim. Proc. § 37.07.

Many important constitutional rights at sentencing have been recognized. For instance, the defendant's right to be present at trial includes sentencing hearings and the

right to counsel applies. *Mempa v. Rhay*, 389 U.S. 128 (1967). The duty of the State to disclose material exculpatory evidence pertains to the punishment phase as well as the guilt phase of a criminal trial. *Ex parte Chavez*, 213 S.W.3d 320, 326 (Tex. Crim. App. 2006). Sentencing a convicted defendant on the basis of inaccurate information constitutes a due process violation. *Townsend v. Burke*, 334 U.S. 736 (1948). Indeed, while certain federal due process rights at sentencing may be limited, the fundamental right to accuracy in sentencing is well recognized. *Id.; Williams v. People of State of N.Y.*, 337 U.S. 241 (1949).

It is a denial of due process for a trial court to arbitrarily refuse to consider the entire range of punishment. *McClenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983) (overruled on other grounds by, *De Leon v. Aguilar,* 127 S.W.3d 1 (Tex. Crim. App. 2004) or refuse to consider mitigating evidence and impose a predetermined punishment. *Howard v. State*, 830 S.W.2d 785, 787 (Tex.App.—San Antonio 1992, pet. ref'd); *Jefferson v. State*, 803 S.W.2d 470, 471 (Tex.App.—Dallas 1991, pet. ref'd); *Cole v. State*, 757 S.W.2d 864, 865 (Tex.App.—Texarkana 1988, pet. ref'd). "Such a practice effectively excludes evidence relevant to punishment, precludes the judge from considering the full range of punishment allowed by law, and deprives the defendant of a fair and impartial punishment tribunal." *Sanchez v. State*, 989 S.W.2d 409, 411 (Tex. App.—San Antonio 1999, no pet.). Likewise, the jury instruction in this case deprived the appellant of a neutral arbiter as the jury was only permitted to consider aggravating factors.

An otherwise legal sentence can be in violation of due process if it was imposed by a judge who refused to consider the unique facts of the offense or the offender or who imposes a fixed or predetermined sentence without considering the full punishment range. *McClenan*, 661 S.W.2d at 111; *Ex parte Brown*, 158 S.W.3d 449, 456 (Tex. Crim. App. 2005) (judge's pattern of imposing prison sentence for any probation violation showed predetermined decision without regard to evidence at probation revocation hearing). Because the right to an impartial sentencer is considered to be an absolute requirement, such a claim may be raised for the first time on appeal even if not raised by a contemporaneous objection at trial *Hernandez v. State*, 268 S.W.3d 176 (Tex. App.—Corpus Christi 2008).

In capital as well as non-capital cases, the U.S. Supreme Court has recognized that sentencing is a critical stage of the proceedings and defendants have a due process right to present evidence at the punishment hearing. *Eddings v. Oklahoma*, 455 US 104 (1978) (capital cases); *Mempa v. Rhay*, 389 U.S. 128 (1967) (non-capital cases) The *Mempa* Court explained that "counsel was necessary to assist defendant in marshaling the facts, introducing evidence of mitigating circumstances and... present[ing] his case as to sentence..." *Id.* at 135. It is a violation of due process for a jury to "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

Additionally, the Supreme Court has recognized that defendants have the due process right to present evidence in parole and probation revocation situations. *Black v.*

Romano, 471 US 606, 614, (1985) The *Black* court specifically stated that "the procedures required by *Gagnon* and *Morrissey* assure the probationer an opportunity to present mitigating evidence and to argue alternatives to imprisonment are appropriate."

A defendant's liberty interests as well as the risks of error are no higher in probation and parole proceedings than they are during the sentencing proceeding. As this Court observed, "[W]hile a state is not constitutionally required to provide for probation and revocation proceedings as a part of its criminal process any more than it is required to provide for appellate review, when it does, then due process and equal protection of the law is fully applicable thereto." *Campbell v. State*, 456 S.W.2d 918, 921 (Tex. Crim. App. 1970). Likewise, while Texas may not be constitutionally required to provide formal sentencing hearings before juries, when it does, it must ensure full due process protection.

Due process entails the right to present a defense. The jury charge worked to exclude the only defensive evidence from the jury's consideration. There are two scenarios in which rulings excluding evidence might rise to the level of a constitutional violation: 1) a state evidentiary rule which categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence which is vital to his defense; and 2) a trial court's clearly erroneous ruling excluding otherwise relevant, reliable evidence which "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Potier v. State*, 68 S.W.3d 657, 662 (Tex. Crim. App. 2002).

In *Tiede*, the court found the trial court's failure to admit evidence of the appellant's defense of sudden passion at punishment to be constitutional error. *Tiede v. State*, 104 S.W.3d 552, 564 (Tex. App.—Tyler 2000, pet. ref'd). That court began by finding that evidence regarding sudden passion is relevant at sentencing. *Id.* at 563. Likewise, this Court has already determined that evidence of drug addiction constitutes compelling mitigation evidence. *Ex parte Smith*, 309 S.W.3d 53, 62 (Tex. Crim. App. 2010). The court in *Tiede* reversed, concluding that "the right to present witnesses to establish a defense is a fundamental element of due process [and]… the right to offer the testimony of witnesses is the right to present the defendant's own version of the facts so that the jury may decide the truth. *Tiede*, at 564.

Under the facts of this case, the jury charge acted arbitrarily to exclude from consideration vital evidence that formed the basis for the central defense at punishment. It prevented the sentencer from considering the sole mitigating evidence, eroded the adversarial nature of the proceeding, and infringed upon the right to present witnesses on one's behalf. This was in violation of due process under the United States and Texas Constitutions.

Ground Three: In its harm analysis of the State's unconstitutional jury argument, the court of appeals did not address how that argument highlighted inadmissible evidence and how it impermissibly increased the likelihood that the jury punished Appellant specifically for an extraneous crime.

During closing argument at punishment, the following occurred:

Prosecutor: Imagine what the end of Hong Le's life was like. You heard his sister testify about the funeral service and having to cover up that wound in the head, and you heard about his children. And I hope you got an opportunity to see how the defendant reacted to that. Nothing, absolutely nothing; never a sign of remorse, never; never a sign of remorse. That is just plain wrong. That is evil, that is something you don't want in our community.

Defense: That's improper argument. She's arguing outside the record of what the accused may look like during testimony. I submit it's not evidence.

Court: Overruled.

(7 R.R. at 203-204).

The court of appeals' lead opinion "presum[ed]… that the prosecutor's comment violated appellant's privilege against self-incrimination," and stated, "Under this presumption, we must reverse the judgment unless we conclude beyond a reasonable doubt that the presumed error did not contribute to the defendant's conviction or punishment." *Smith v. State*, 522 S.W.3d 628, 637 (Tex. App.—Houston [14th Dist.] 2017, pet. granted).

Justice Christopher's dissent strongly criticized the opinion's description of the argument as "presumed error," stating, "That characterization does not go far enough. The prosecutor's closing argument was categorically improper and the trial court's ruling was actual error. In this court, not even the State pretends otherwise. I would characterize the trial court's ruling as 'error,' not 'presumed error.' We cannot expect the administration of our criminal justice system to improve if we are unwilling to acknowledge true errors for what they are." *Id.* at 652 n. 3.

The defendant's demeanor while in the courtroom is not evidence and therefore, is not an appropriate subject by the prosecutor in argument. *Davis v. State*, 964 S.W.2d 14, 17 (Tex. App.—Tyler 1997, pet. ref'd). When no testimony exists concerning the defendant's lack of remorse, a comment on his lack of remorse would naturally and necessarily be one on the defendant's failure to testify because only he can testify as to his own remorse. *Swallow v. State*, 829 S.W.2d 223, 225 (Tex. Crim. App. 1992).

Commenting on the defendant's failure to testify offends the United States and Texas Constitutions as well as Texas statutory law. *See* U.S. Const. amend. V; Tex. Const. art. I, § 10; Tex. Code Crim. Proc. art. 38.08. Article 38.08 of the Code of Criminal Procedure provides that if the accused invokes his right not to testify during his trial, it shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by the prosecuting attorney. A defendant has the Fifth Amendment right against self-incrimination at both the guilt-innocence and

punishment stages of trial. *Wilkens v. State*, 847 S.W.2d 547, 553 (Tex. Crim. App. 1992), cert. denied, 507 U.S. 1005 (1993).

When confronted with a constitutional error, a reviewing court must analyze the error under Rule 44.2(a), reversing the judgment unless it can conclude beyond a reasonable doubt that the error did not contribute to the punishment. Tex. R App. Pro 44.2(a). As this Court has observed, in determining whether the error contributed to the conviction or punishment, a court must focus on how the error impacted the "integrity of the fact-finding process rather than simply looking to the justifiability of the fact-finder's results." *Snowden v. State*, 353 S.W.3d 815, 820 (Tex. Crim. App. 2011).

This Court has "rejected the proposition that a constitutional error may be deemed harmless simply because the reviewing court is confident that the result the jury reached was objectively correct or that, in any event, the jury could have reached the same result no matter how much the error may have facilitated that resolution." *Id.* at 819.

It is acceptable for the reviewing court to consider factors such as "the nature of the error (e.g., erroneous admission or exclusion of evidence, objectionable jury argument, etc.), whether it was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to it in the course of its deliberations" but these are not the exclusive factors. *Id.* at 822. In assessing harm a court "should take into account any and every circumstance apparent in the record that logically informs an appellate determination." *Id.*

In this case, it should be noted that the improper argument pointed the jury's attention to the extraneous murder and then to the testimony of the extraneous victim's sister who testified as a victim-impact witness. After briefly summarizing her testimony, the prosecutor argued to the jury, "I hope that during that testimony you got an opportunity to see how the defendant reacted to that." (7 R.R. at 203).

The harm from the prosecutor's argument was amplified by the fact that it not only drew the jury's attention to the appellant's demeanor, but it also highlighted his alleged reaction during testimony that was already teetering on the brink of unfairly prejudicial evidence. As this Court has observed, "The danger of unfair prejudice to a defendant inherent in the introduction of 'victim impact' evidence with respect to a victim not named in the indictment on which he is being tried is unacceptably high." *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997). Victim-impact testimony regarding an extraneous offense, if objected to, is generally inadmissible. *Id.*

This Court has propounded the principle that "a defendant should not be assessed punishment for collateral crimes or for being a criminal generally, but is entitled to be punished upon the accusations in the indictment for which he has been found guilty." *Lomas v. State*, 707 S.W.2d 566, 568 (Tex. Crim. App. 1986). Moreover, "the State must avoid presenting an argument that encourages the jury to include in their verdict additional punishment for a collateral crime or for a defendant being a criminal generally." *Id.* at 569.

By using a blatantly unconstitutional argument in violation of the appellant's rights in order to emphasize evidence that already walked the fine line of inflammatory testimony, the risk of unfair harm grew exponentially. "[T]his Court has repeatedly emphasized the importance of avoiding a final argument that encourages the jury to try, convict or punish a defendant additionally for collateral crimes that have become apparent through introduction of the facts and circumstances immediately surrounding the offense charged." *Lomas*, at 569.

Furthermore, the argument in this case did not merely point at the appellant's alleged demeanor, it did so in incendiary fashion. The prosecutor labeled the appellant's appearance as "plain wrong" and "evil" and urged that appellant was "something you don't want in our community." This is in contrast to the argument held harmless in *Snowden* which consisted of a single statement that the defendant's lack of remorse at the time of the offense was "just like he is today." 353 S.W.3d at 817.

The argument in this case is harmful because it personalized the victim of the extraneous offense while at the same time dehumanizing the appellant. This likely inflamed the jury in such a way that it felt the need to take the argument into consideration and punish the appellant for the extraneous offense. Thus the jury would likely attach more than a minimal weight to the argument because it would have so strongly appealed to their emotions.

The lead opinion of the court of appeals borders on holding the argument to be harmless solely because it was confident that the appellant—in the court's own

opinion—deserved a life sentence. But in *Snowden*, this Court was careful to reject "the proposition that a constitutional error may be deemed harmless simply because the reviewing court is confident that the result the jury reached was objectively correct." *Snowden*, at 819.

The focus of the State's argument was on highlighting the most prejudicial evidence admitted at punishment and directly commenting on the appellant's courtroom demeanor during production of this evidence. This comment was not correlated to the appellant's lack of remorse at the time of any offense but rather during the inflammatory testimony itself.

Considering that the appellant received the maximum sentence allowed by law, it is reasonable to conclude that the improper argument genuinely contributed to the jury's punishment verdict. *See Lomas*, 707 S.W.2d at 570 ("We are unable to find the State's improper argument harmless because appellant was assessed the maximum term of years available for the offense"); *Rogers v. Lynaugh*, 848 F.2d 606, 612 (5th Cir. 1988) ("Finally and most compelling, there is the affirmative evidence of harmful effect in the fact that, from among its many sentencing options, the present jury selected the very forty-year prison term advocated by the State…").

The lead Supreme Court case of *Griffin v. California* described a comment on a non-testifying defendant's demeanor, stating, "It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the

prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance." *Griffin v. California*, 380 U.S. 609, 613 (1965).

"What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Id.* at 613.

PRAYER

FOR THESE REASONS, the Appellant respectfully prays that this Honorable Court reverse the judgment and remand for a new hearing on punishment.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ Sarah V. Wood
SARAH V. WOOD
Assistant Public Defender
Harris County Texas
1301 Franklin, Suite 100
Houston Texas 77002
(713) 368-0016 (phone)
(713) 368-9278 (fax)
State Bar Number 24048898
Sarah.Wood@pdo.hctx.net

CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that this filing has 8,895 words and that a copy of the foregoing reply to the State's petition for discretionary review has been served on the District Attorney of Harris County, Texas, by the efile service and to the State Prosecuting Attorney.

/s/ Sarah V. Wood
SARAH V. WOOD